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# I WOULD LIKE TO REQUEST YOUR ACADEMIC RECORDS: FERPA PROTECTIONS AND THE WASHINGTON PUBLIC RECORDS ACT

Tevon Edwards\*

*Abstract:* The Washington Public Records Act is a broad mandate for the release of almost all public records. In response to a request, a state or local agency must produce the requested records unless a specific exemption applies. In part to enforce compliance on public agencies, the Public Records Act requires that a requester be compensated for statutory fees, costs, and attorneys' fees if a government agency declines to provide a public record, is challenged, and the requester succeeds in court. However, within public education agencies, compliance with the Washington Public Records Act can run against the agencies' requirements under the Federal Education Rights and Privacy Act.

The Federal Education Rights and Privacy Act mandates a broader protection of student records than is provided by the Washington Public Records Act. An agency's violation of the Federal Rights and Privacy Act can result in the loss of all federal education funds. Federal education funds are vital both to school districts and to post-secondary universities for student grants and secured loans. Thus, Washington education agencies are left in a Catch-22: release records and potentially lose federal education money or safeguard the records and pay substantial fines and fees under the Public Records Act.

However, there is a potential failsafe. The Washington Public Records Act allows for courts to find public records exempted from production by an "other statute" that exempts production. Thus, Washington courts should find that the Federal Education Rights and Privacy Act is an "other statute" that exempts production of student records not otherwise exempted by the Washington Public Records Act.

## INTRODUCTION

Washington's Public Records Act (PRA) is "a strongly worded mandate for broad disclosure of public records."<sup>1</sup> The PRA defines public records quite broadly<sup>2</sup> and requires production of requested

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\* J.D. Candidate, University of Washington School of Law, Class of 2018. I would like to thank Professor Hugh Spitzer for his edits and guidance, and the stellar team at *Washington Law Review*, without which this piece would not be possible. By way of full disclosure, I work for Porter Foster Rorick, LLP, a firm that primarily represents school districts and have previously interned for the Education Division of the Washington Attorney General. All opinions are my own.

1. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wash. 2d 243, 251, 884 P.2d 592, 597 (1994) (quoting *Hearst Corp. v. Hoppe*, 90 Wash. 2d 123, 127, 580 P.2d 246, 249 (1978)).

2. WASH. REV. CODE § 42.56.010 (2016) ("Public record" includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.").

records unless release of the record is specifically barred by an exemption contained in the PRA.<sup>3</sup> There are over 100 express exemptions to the PRA,<sup>4</sup> and there is a specific exemption that limits access to “[p]ersonal information in any files maintained for students in public schools.”<sup>5</sup> However, the Washington State Supreme Court has stated PRA requests “shall be liberally construed and its exemptions narrowly construed.”<sup>6</sup> This limits the scope of PRA exemptions for student records and has the potential to conflict with Family Education Rights and Privacy Act (FERPA)<sup>7</sup> requirements, which attach to any disbursement of federal education money.<sup>8</sup> An education agency’s failure to follow FERPA can result in the complete loss of all federal education funds.<sup>9</sup>

Federal education money is vital for both K-12 public schools and public universities.<sup>10</sup> Federal education money is appropriated to all levels of public education, including school lunch programs, low-income Title I Schools, Head Start Pre-K programs, student scholarships, government secured loans, research grants, and direct funding to colleges and universities.<sup>11</sup> However, through FERPA, the term “education records” has been interpreted broadly<sup>12</sup> and thus has the

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3. *Id.* § 42.56.070.

4. *E.g.*, *id.* § 42.56.210(1) (confidential private income data).

5. *Id.* § 42.56.230.

6. *Id.* § 42.56.030.

7. 20 U.S.C. § 1232g (2012).

8. *Id.* § 1232g(a)(1)(a).

9. *Id.* Although beyond the scope of this Comment, there is no private cause of action in FERPA. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002). As a result, students who believe that their education records were released can only complain to the Department of Education and request an investigation. See Lynn M. Daggett, *FERPA in the Twenty-First Century: Failure to Effectively Regulate Privacy for All Students*, 58 CATH. U. L. REV. 59, 66 (2008) (noting that technically the student reports to the Family Policy Compliance Office under the Department of Education). FERPA’s lack of a private cause of action has been a matter of significant scholarly debate. See *id.* at 66–68; Tyler J. Dunphy, *FERPA’s Faux Pas: A Call for Enforceable Student Rights to Combat State Disclosure Laws*, 91 TUL. L. REV. 537, 549 (2017).

10. Jason Delisle, *Putting a Number on Federal Education Spending*, N.Y. TIMES: ECONOMIX (Feb. 26 2016), <http://economix.blogs.nytimes.com/2013/02/27/putting-a-number-on-federal-education-spending/> [https://perma.cc/8V46-ZZC2] (utilizing Congressional Budget Office reports claiming approximately \$107.6 billion. Breaking that number down, \$14.8 billion went directly to K-12 school nutrition funding, \$8 billion to Head Start programs, and \$67.5 billion as direct appropriation). Federal education money is also important to private universities, but this does not conflict with the PRA.

11. *Id.*; see *infra* section II.B.

12. See, e.g., Dixie Snow Huefner & Lynn M. Daggett, *FERPA Update: Balancing Access to and Privacy of Student Records*, 152 EDUC. L. REP. 469 (2001).

potential to conflict with the narrow exemptions of the PRA. “Education records” encompasses any recorded information “directly related” to a particular student and maintained by a school, an education agency, or an independent contractor on behalf of the agency.<sup>13</sup> Records—such as trespass orders created by a school disciplinary body, a letter from parent to teacher, or other records not “maintained for students” but “directly related” to students—could be producible under the PRA but also constitute “education records” under FERPA.

Washington courts interpret PRA exemptions narrowly.<sup>14</sup> For example, in a recent case a school district attempted to use the “student files” exemption to the PRA to exempt release of a school bus videotape that was used in the student disciplinary process.<sup>15</sup> The Supreme Court of Washington ruled that although this videotape was in the student’s disciplinary file, it did not qualify as personal information.<sup>16</sup> Thus, the videotape was producible in a public records request.<sup>17</sup> Because the school district had not initially produced the videotape, the school district was liable for PRA statutory damages, costs, and attorneys’ fees.<sup>18</sup> However, the United States Department of Education (DOE) stridently protects the FERPA definition of “education record.”<sup>19</sup> In various cases, the DOE has directly threatened an education agency’s federal funds if the agency produces “education records” even if required to do so by the state’s public records law.<sup>20</sup> Thus, Washington State education agencies are left in the quandary of deciding which law to follow when faced with conflicting requirements.

In order to keep federal education money, school districts and public colleges need to find another available statutory basis for exempting these records. The PRA does contain an important provision exempting a public record if an “other statute . . . exempts or prohibits disclosure of *specific* information or records.”<sup>21</sup> Given the importance of federal money, Washington courts should find that the “other statutes” clause prohibits the disclosure of public records covered by FERPA.

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13. 34 C.F.R. § 99.3 (2017); *see also* 20 U.S.C. § 1232g.

14. WASH. REV. CODE § 42.56.030 (2016).

15. *Lindeman v. Kelso Sch. Dist.* No. 458, 162 Wash. 2d 196, 201–02, 172 P.3d 329, 331 (2007).

16. *Id.*

17. *Id.*

18. *Id.* at 204, 172 P.3d at 332.

19. *See infra* section II.B.

20. *See, e.g., United States v. Miami Univ.*, 294 F.3d 797, 809 (6th Cir. 2002).

21. WASH. REV. CODE § 42.56.070 (2016) (emphasis added).

This Comment examines the interplay between the PRA and FERPA. Part I explores the expanse of the PRA, specifically examining the narrow “files maintained for students” exemption and the “other statutes” exemption. Part II covers FERPA’s definitions and protections for student records. Part III studies the interaction between FERPA and the PRA’s “other statute” exemption. Finally, this Comment argues that FERPA is a valid “other statute” exemption to the PRA.

## I. A VOTER INITIATIVE CREATED ONE OF THE NATION’S STRONGEST PUBLIC RECORDS ACTS

Washington state voters enacted Initiative 276 (I-276) in 1972.<sup>22</sup> A majority of I-276 dealt with campaign finance laws and lobbying,<sup>23</sup> but the last part of I-276 became what is now called the PRA. The initiative required political candidates to disclose the source and amount of political contribution<sup>24</sup> and required lobbyist registration.<sup>25</sup> However, I-276 also required state and local agencies to allow public access to government documents.<sup>26</sup> Over the years, the PRA has grown in complexity.<sup>27</sup> All agencies are now required to have designated individuals trained to respond to public record requests.<sup>28</sup>

### A. *The PRA Contains Significant Requirements Mandating Broad Agency Record Disclosure*

The PRA contains a number of requirements for all state or municipal agencies to follow. The broadest requirement is that all agencies “in accordance with published rules, shall make available for public

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22. Act of Dec. 7, 1972, ch.1, 1973 Wash. Sess. Laws 1 (1972).

23. *Id.* (chapter I created campaign contribution limits and contributor reporting requirements to state agencies; chapter II limited lobbying and required certain reporting requirements; chapter III required elected officials to disclose certain financial information to state agencies; chapter IV created public access to public records).

24. *Id.* at 18–20 (Ch. III).

25. *Id.* at 12–18 (Ch. II).

26. *Id.* at 21–24.

27. *See, e.g.*, Public Records Disclosure—Revisions, ch. 139, 1992 Wash. Sess. Laws 559 (adding tight timelines to respond to requests and including film, videos and electronic files to definition of records).

28. *See* WASH. REV. CODE § 42.56.580 (2016) (every state and local agency must appoint public records officer); *id.* § 42.56.152 (all public record officers must complete mandatory training within ninety days of assuming office); *id.* § 42.56.150 (all elected local and state officials must complete “training course regarding the provisions of” the PRA within “ninety days after the date the official either” takes oath of office or assumes duties).

inspection and copying all public records” unless the record falls within an exemption.<sup>29</sup> This requirement hinges on the definition of public records, which, due to the PRA’s expansive classifications, encompasses “any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.”<sup>30</sup> This definition thus includes any document,<sup>31</sup> email,<sup>32</sup> text message,<sup>33</sup> video,<sup>34</sup> metadata,<sup>35</sup> or recording<sup>36</sup> created by an agency. Additionally, the location of the documents is inconsequential; public records stored on a private computer or cell phone still must be disclosed.<sup>37</sup>

Since the form of the writing is inconsequential, the second piece of the definition of a public record, the purpose of the writing, becomes essential. As the Washington State Supreme Court has noted, “‘public record’ is defined very broadly, encompassing virtually any record related to the conduct of government.”<sup>38</sup> Essentially all “writing,” whether created by state or local agency employees or created by outside sources, that is then used by aforementioned employees, is a public record.<sup>39</sup>

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29. *Id.* § 42.56.070(1).

30. *Id.* § 42.56.010; *see also id.* § 42.17A.005(40).

31. *Id.* § 42.56.010.

32. *Id.* § 42.56.010(4); *see also* Tiberino v. Spokane County, 103 Wash. App. 680, 687, 13 P.3d 1104, 1108 (2000).

33. Nissen v. Pierce County, 183 Wash. 2d 863, 877, 357 P.3d 45, 53 (2015).

34. Lindeman v. Kelso Sch. Dist. No. 458, 162 Wash. 2d 196, 201–02, 172 P.3d 329, 331 (2007).

35. O’Neill v. City of Shoreline, 145 Wash. App. 913, 935, 187 P.3d 822, 832 (2008), *aff’d in part, rev’d in part*, 170 Wash. 2d 138, 240 P.3d 1149 (2010) (Washington State Supreme Court left metadata holding undisturbed).

36. WASH. REV. CODE § 42.56.010.

37. Nissen, 183 Wash. 2d at 877, 357 P.3d at 53; West v. Vermillion, 196 Wash. App. 627, 639, 384 P.3d 634, 638 (2016). A related point, although not at issue in this Comment, is that under certain circumstances private contractors can be considered public agencies for the purposes of the PRA. *See* Clarke v. Tri-Cities Animal Care & Control Shelter, 144 Wash. App. 185, 195, 181 P.3d 881, 886 (2008); Jeffrey A. Ware, Comment, Clarke v. Tri-Cities Animal Care & Control Shelter: *How Did Private Businesses Become Government “Agencies” Under the Washington Public Records Act?*, 33 SEATTLE U. L. REV. 741, 743–45 (2010).

38. O’Neill, 170 Wash. 2d at 147, 240 P.3d at 1153.

39. *Id.*; Does v. King County, 192 Wash. App. 10, 22, 366 P.3d 936, 942 (2015) (noting that records of a private university which were given to the police in an investigation became public records as a result of the investigation).

### 1. *Public Record Requests: Timeline of Events*

Inherent to public records disclosure, the PRA prescribes procedures that govern disclosure of records.<sup>40</sup> At the outset, all local and state agencies must enact regulations that outline their compliance with the PRA.<sup>41</sup> These regulations must comply with the procedural requirements of the PRA<sup>42</sup>—such as the definitions of public records—while allowing agencies to determine reasonable regulations about accessing public records.<sup>43</sup> These regulations can include hours for seeking public records,<sup>44</sup> location of public records,<sup>45</sup> and methodology for making a public record request.<sup>46</sup>

The PRA itself contains a number of specifically delineated steps that an agency must take to comply with a public records request. The PRA requires that agencies respond to requests within five business days.<sup>47</sup> The agency must respond by 1) providing the record or a way of accessing the record, 2) providing a reasonable estimate of the amount of time necessary to fulfill the request, or 3) denying the request.<sup>48</sup> Additionally, if the initial request is unclear, the agency may respond by seeking clarification of what precisely is being sought.<sup>49</sup> If the requester fails to respond to the clarification request, no additional action by the agency is necessary.<sup>50</sup> When the PRA was originally enacted in 1972, vast quantities of electronic documents did not exist. Instead, agencies had a location where the public could come in and view, or potentially copy public records at the individual's expense.<sup>51</sup> Significant increases in record retention due to electronic records have dramatically increased the number of responsive public records for any search.<sup>52</sup> Due to broad

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40. See generally William D. Richard, Comment, *Procedural Rules Under Washington's Public Records Act: The Case for Agency Discretion*, 85 WASH. L. REV. 493, 498–500, 502–03 (2010).

41. WASH. REV. CODE § 42.56.100.

42. *Id.*

43. *Id.* (“Agencies shall adopt and enforce reasonable rules and regulations [for public records and considering] . . . the time, resource, and personnel constraints . . .”).

44. *E.g.*, WASH. ADMIN. CODE § 44-06-070 (2018).

45. *E.g.*, *id.* § 44-06-050.

46. *E.g.*, *id.* § 44-06-080 (“A request shall be made in writing (or by fax or electronic mail if desired) upon a form prescribed by the office which shall be available. . .”).

47. WASH. REV. CODE § 42.56.520.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* § 42.56.080.

52. Richard, *supra* note 40 at 498.

requests and increased ability to search for responsive electronic documents, the PRA allows agencies to release documents in installments provided that the agencies outline reasonable deadlines and inform the requester of the determination within five business days of the request.<sup>53</sup> If a record is scheduled for destruction “in the near future” and a request for the record comes in, the agency must retain the record until “the request is resolved.”<sup>54</sup>

Once a request is made, the agency must perform a search for the records requested. Although not outlined explicitly in the statute, the Washington State Supreme Court incorporated the federal Freedom of Information Act requirements for an “adequate search” for responsive records.<sup>55</sup> The question of an adequate search is not whether responsive records existed and were not found, but instead, whether the search that occurred was reasonable. If an individual later seeks judicial review,<sup>56</sup> then the court will examine whether the search was “reasonably calculated to uncover all relevant documents.”<sup>57</sup> In defining a reasonable search, the Court held that it is not sufficient to simply perform a perfunctory search using only search terms; instead, an agency must follow any evidence that implies additional records may be found outside of the typical search.<sup>58</sup> Finally, a search cannot be limited to “only one record system if there are others that are likely to turn up the information requested.”<sup>59</sup> At the summary judgment stage, the agency bears the burden of showing beyond a material doubt that the search was adequate.<sup>60</sup> A failure to perform an adequate search is treated as a denial of the request, and penalties<sup>61</sup> for the denial are the same.<sup>62</sup> In determining whether a search is adequate, an agency can submit

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53. *Id.*; WASH. REV. CODE § 42.56.520.

54. WASH. REV. CODE § 42.56.100. This often becomes an issue if part of the request is denied. In these cases, the record is retained until either the statute of limitations on the PRA claim runs, or the court proceeding terminates. *O'Neill v. City of Shoreline*, 170 Wash. 2d 138, 149, 240 P.3d 1149, 1154 (2010).

55. *Neighborhood All. of Spokane County v. Spokane County*, 172 Wash. 2d 702, 708–09, 261 P.3d 119, 122 (2011) (“We hereby adopt Freedom of Information Act (FOIA) standards of reasonableness regarding an adequate search, consistent with the Court of Appeals’ decision.”).

56. *See infra* section I.D.

57. *Neighborhood*, 172 Wash. 2d at 720, 261 P.3d at 128.

58. *Id.*

59. *Id.* (quoting *Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)).

60. *Id.* at 721, 261 P.3d at 128.

61. *See infra* section I.D.

62. *Neighborhood*, 172 Wash. 2d at 721, 261 P.3d at 128; *Soter v. Cowles Publ’g Co.*, 162 Wash. 2d 716, 750–51, 174 P.3d 60, 78 (2007).



“reasonably detailed, non-conclusory affidavits attesting to the nature and extent of the search.”<sup>63</sup>

*B. The Status of the Requester Is Irrelevant to the Request*

An interesting aspect of the PRA is that the identity of the requester is generally inconsequential to the request.<sup>64</sup>

Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request except to establish whether inspection and copying would violate [a] . . . statute which exempts or prohibits disclosure of specific information or records to certain persons.<sup>65</sup>

The two situations in which requester identity can exempt public records from disclosure are found in Revised Code of Washington sections 42.56.250(14) and 42.56.070(9).<sup>66</sup> The first statute deals with body camera footage by a police or corrections officer in a number of highly personal locations; in these circumstances only certain state officials or a person directly involved in the recording can request the footage.<sup>67</sup> The second states that the disclosure of license applicants and professional licensees must be allowed for “professional associations or educational organizations recognized by their professional licensing or examination board.”<sup>68</sup> Other than these two exemptions, the identity of the requester does not factor into how the agency responds to the request.<sup>69</sup>

*C. Exceptions to the Duty to Produce Records*

*1. “Disclosing” a Record Differs from “Producing” a Record*

Clearly defined terms are vital when discussing types of records exemptions.<sup>70</sup> Given the ambiguity of terms used within the PRA, in *Sanders v. State*,<sup>71</sup> the Washington State Supreme Court gave express

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63. *Nissen v. Pierce County*, 183 Wash. 2d 863, 885, 357 P.3d 45, 57 (2015) (internal quotations omitted).

64. WASH. REV. CODE § 42.56.080 (2016).

65. *Id.*

66. *Id.*; *id.* § 42.56.240; *id.* § 42.56.070.

67. *Id.* § 42.46.240(14).

68. *Id.* § 42.56.070.

69. *Id.* § 42.56.080.

70. *Sanders v. State*, 169 Wash. 2d 827, 836, 240 P.3d 120, 125 (2010).

71. 169 Wash. 2d 827, 240 P.3d 120 (2010).

definitions for a number of key ideas.<sup>72</sup> While courts have not used these terms consistently,<sup>73</sup> they help provide a clear framework when analyzing exemptions. A record is “either ‘disclosed’ or ‘not disclosed.’” A record is disclosed if its existence is revealed to the requester in response to a PRA request, regardless of whether it is produced.<sup>74</sup> Under the PRA, an agency must always disclose a record.<sup>75</sup> Next, a disclosed record is either “produced,” meaning made available for production, or a record is “withheld,” meaning not produced in response to a request.<sup>76</sup> A withheld record that is not subject to an exemption is a violation of the PRA.<sup>77</sup> Responsive records must be disclosed, meaning their existence is communicated via an exemption sheet, but exempt records can be lawfully withheld.<sup>78</sup> A properly withheld record must be listed on an exemption sheet, where the agency lists the exemption that applies to the file.<sup>79</sup>

## 2. *Washington Courts Interpret PRA Exemptions Narrowly*

Over 100 exemptions are sprinkled throughout the fifty-seven sections of the PRA,<sup>80</sup> however, underpinning the PRA is the oft-cited<sup>81</sup> rule of PRA interpretation: “[t]his chapter [of the PRA] shall be liberally construed and its exemptions narrowly construed.”<sup>82</sup>

Washington courts interpret all exemptions narrowly in accordance with the PRA’s governing principle. For example, in *Predisik v. Spokane*

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72. *Id.*

73. *See, e.g.*, *Nissen v. Pierce County*, 183 Wash. 2d 863, 870, 357 P.3d 45, 50 (2015) (using the term “disclosed” to refer to what the County actually “produced”).

74. *Sanders*, 169 Wash. 2d at 836, 240 P.3d at 125.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* (this satisfies the disclosure requirement as well).

80. *See* MUN. RESEARCH AND SERVS. CTR., PUBLIC RECORDS ACT FOR WASHINGTON CITIES, COUNTIES, AND SPECIAL PURPOSE DISTRICTS (2016), <http://mrsc.org/getmedia/796a2402-9ad4-4bde-a221-0d6814ef6edc/Public-Records-Act.pdf.aspx?ext=.pdf> [<https://perma.cc/Y54X-KDQP>].

81. Nearly every reported public records case quotes Revised Code of Washington section 42.56.030. *See, e.g.*, *Wade’s Eastside Gun Shop, Inc. v. Dep’t of Labor & Indus.*, 185 Wash. 2d 270, 277, 372 P.3d 97, 99 (2016); *Does v. King County*, 192 Wash. App. 10, 20, 366 P.3d 936, 941 (2015).

82. WASH. REV. CODE § 42.56.030 (2016). For a longer discussion of the PRA’s various exemptions, see Philip Paine, Comment, *Public Records in Private Devices: How Public Employees’ Article I, Section 7 Privacy Rights Create a Dilemma for State and Local Government*, 90 WASH. L. REV. 545, 556–57 (2015) (discussing various privacy exemptions).

*School District*,<sup>83</sup> two media outlets requested information regarding the ongoing investigation of two school employees.<sup>84</sup> The information requested included an administrative leave letter addressed to one of the employees and two spreadsheets outlining the amount of pay that the two employees had accumulated while on administrative leave.<sup>85</sup> The employees sued to enjoin the release of the public records, citing the privacy for personal information exemption of section 42.56.230(3).<sup>86</sup> This exemption limits disclosure of “[p]ersonal information in files maintained for employees . . . of a public agency to the extent that disclosure would violate right to privacy.”<sup>87</sup> The Washington State Supreme Court held that the teachers did not have a privacy interest in records regarding the school district’s investigation of the teachers because those records concerned the school employees’ public lives as public employees, and thus privacy rights were not implicated.<sup>88</sup> Even though the investigation was still ongoing, and as such the release of these records could have brought professional harm to the school employees, that alone did not implicate the privacy exemption.<sup>89</sup>

3. *The “Files Maintained for Students” Exemption Does Not Exempt All Student Records*

Of the exceptions, the one most vital to this Comment is the exemption for files maintained for students.<sup>90</sup> It exempts production of “[p]ersonal information in any files maintained for students in public schools.”<sup>91</sup> Like all exemptions to the PRA, the exemption is narrow and has been held to be limited to files for the *benefit of students* in public school.<sup>92</sup> In the most recent suit where this exemption was implicated—*Lindeman v. Kelso School District Number 458*<sup>93</sup>—the Washington State Supreme Court held that the narrow exemption was aimed towards

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83. 182 Wash. 2d 896, 346 P.3d 737 (2015).

84. *Predisik v. Spokane Sch. Dist.* No. 81, 182 Wash. 2d 896, 901, 346 P.3d 737, 739 (2015).

85. *Id.*

86. *Id.* at 902, 346 P.3d at 739.

87. WASH. REV. CODE § 42.56.230(3) (2016).

88. *Predisik*, 182 Wash. 2d at 907, 346 P.3d at 742 (“[N]o right of privacy exists in the leave letter or spreadsheets, we need not decide if disclosure of those records would violate that right.”).

89. *Id.* at 908, 346 P.3d at 742.

90. WASH. REV. CODE § 42.56.230(1).

91. *Id.*

92. *Lindeman v. Kelso Sch. Dist.* No. 458, 162 Wash. 2d 196, 202, 172 P.3d 329, 331 (2007).

93. 162 Wash. 2d 196, 172 P.3d 329 (2007).

necessary files that a school must retain for students, such as “student[s’] grades, standardized test results, [and] assessments.”<sup>94</sup>

In *Lindeman*, parents of a student used a public record request to obtain the surveillance footage of an altercation between two students on a school bus.<sup>95</sup> The school district denied the request, citing the student files exemption.<sup>96</sup> The appellate court upheld the denial.<sup>97</sup> However, the Washington State Supreme Court reexamined the exemption in question and found that student files must be construed narrowly. The Court held that the information must both be “personal” and “maintained for students.”<sup>98</sup> The Court found that because the purpose of the surveillance footage was for the safety and security of students on school buses, and not maintained for student files, the record was producible.<sup>99</sup> Furthermore, the placement of the footage into a student’s file did not alter the purpose of the recording.<sup>100</sup>

#### 4. *The “Other Statutes” Exemption Allows Incorporation of Non-PRA Exemptions but Is Limited*

In addition to the variety of express exemptions to production within the PRA, the statute contains a short clause exempting all records affected by an “other statute which exempts or prohibits disclosure of specific information or records.”<sup>101</sup> This exemption requires that the “other statute” *specifically* limit production of the document.<sup>102</sup> The courts cannot infer an exemption.<sup>103</sup>

This exemption has featured in several key situations vital to public governance. In *Hangartner v. City of Seattle*,<sup>104</sup> an individual requested documents related to a monorail transit system.<sup>105</sup> The city produced a large number of documents, but the city refused to produce three

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94. *Id.* at 202, 172 P.3d at 331.

95. *Id.* at 199, 172 P.3d at 330.

96. *Id.* at 199–200, 172 P.3d at 330.

97. *Lindeman v. Kelso Sch. Dist.* No. 458, 127 Wash. App. 526, 541, 111 P.3d 1235, 1243 (2005), *as corrected* (May 23, 2005), *rev’d*, 162 Wash. 2d 196, 172 P.3d 329 (2007).

98. *Lindeman*, 162 Wash. 2d at 202, 172 P.3d at 331.

99. *Id.*

100. *Id.*

101. WASH. REV. CODE § 42.56.070 (2016).

102. *White v. Clark County*, 188 Wash. App. 622, 631, 354 P.3d 38, 41 (2015).

103. *Id.*; *see also* *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wash. 2d 243, 262, 884 P.2d 592 (1994).

104. 151 Wash. 2d 439, 90 P.3d 26 (2004).

105. *Id.* at 443, 90 P.3d at 28.

items.<sup>106</sup> In withholding these items, the city cited the attorney-client privilege embodied in Revised Code of Washington section 5.60.060(2), and it argued section 5.60.060(2) was an “other statute” exempting production under the PRA.<sup>107</sup> The city was successful at the Washington State Supreme Court, and attorney-client privilege was recognized as a valid exemption to the PRA.<sup>108</sup> Similarly, in other decisions, courts have found that statutes dealing with attorney work product,<sup>109</sup> election ballots,<sup>110</sup> and drug and alcohol tests for employees subsequent to an accident<sup>111</sup> also fall under the “other statutes” exemption.

However, not all statutes that proscribe certain methods of disclosure of information qualify as “other statutes.” In *Doe ex rel. Roe v. Washington State Patrol*,<sup>112</sup> an individual requested the registration forms of all sex offenders with last names beginning with the letter “A.”<sup>113</sup> Before releasing the files, the Washington State Patrol alerted all “level 1” offenders whose records were included in the request.<sup>114</sup> A number of these offenders sued to enjoin production.<sup>115</sup> The “level 1” offenders claimed that their records were covered by Washington Revised Code section 4.24.550, which outlined a distinct method of disclosing records related to sexual offenders and thus was an “other statute” limiting production.<sup>116</sup> This statute gave the Washington State Patrol<sup>117</sup> permission to release “relevant and necessary” “level 1” sexual offender records in response to a request, following good faith consideration of the risk classification of the offender, the offender’s location, and the need of the requester to have this information for self-

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106. *Id.*

107. *Id.* (noting that the city also cited the “controversy exemption” but were unable to convince the court of this).

108. *Id.* at 454, 90 P.3d at 33.

109. *Sanders v. State*, 169 Wash. 2d 827, 855, 240 P.3d 120, 135 (2010).

110. *White v. Clark County*, 188 Wash. App. 622, 631, 354 P.3d 38, 42 (2015), *review denied*, 185 Wash. 2d 1009, 366 P.3d 1245 (2016) (holding a combination of the Washington Constitution art. VI, § 6, and various sections of chapter 29A Wash. Rev. Code exempted disclosure).

111. *Freedom Found. v. Wash. State Dep’t of Transp.*, 168 Wash. App. 278, 289, 276 P.3d 341, 347 (2012) (finding that the federal regulation 49 C.F.R. § 40.321 was an “other statute” that exempted production).

112. 185 Wash. 2d 363, 374 P.3d 63 (2016).

113. *Id.* at 368, 374 P.3d at 65. Additionally, there were requests for sex offender files of all offenders with the last name beginning with “B.” *Id.*

114. *Id.* “Level 1” offenders are considered the lowest risk of re-offense. *Id.*

115. *Id.*

116. *Id.*

117. As well as the Washington Association of Sheriffs and Police.

protection.<sup>118</sup> By relying on the PRA, the requester was able to receive the information without the good faith examination by the Washington State Patrol.<sup>119</sup> The Washington State Supreme Court held that section 4.24.550 did not bar a PRA request because the purpose of the statute was to promote the release of information, not limit it.<sup>120</sup> The legislative history of section 4.24.550 supports the contention that the legislature had felt that there was too much confidentiality regarding sexual offenders, and that the public had a right to know.<sup>121</sup> Furthermore, the Court noted that there was no indication that the legislature intended the statute to be the sole method of producing sex offender information.<sup>122</sup>

Additionally, the Washington courts have found that federal agency rules can be valid exemptions under the “other statutes” provision.<sup>123</sup> In *Ameriquist Mortgage Co. v. Washington State Office of Attorney General*,<sup>124</sup> the Washington State Supreme Court held that the Federal Trade Commission’s rule regarding bank record disclosures was a valid exemption to the PRA through the “other statutes” exemption.<sup>125</sup> However, to date, Washington courts have not held any state or local agency rules to be “other statute” exemptions.

*D. An Agency’s Failure to Release Records Can Result in Significant Costs to the Agency*

A significant motivation for agencies to comply with the PRA requirement of broad disclosure is the aggressive penalties imposed when agencies act beyond the confines of the law.<sup>126</sup> These penalties—paid out of government agency budgets—have significant effects on agency decision-making and can impose huge financial costs to

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118. *Doe ex rel. Roe*, 185 Wash. 2d at 369–70, 374 P.3d at 66.

119. *Id.*

120. *Id.* at 373, 374 P.3d at 67.

121. *Id.*

122. *Id.*

123. *Ameriquist Mortg. Co. v. Wash. State Office of Att’y Gen.*, 170 Wash. 2d 418, 440, 241 P.3d 1245, 1255 (2010); *Freedom Found. v. Wash. State Dep’t of Transp., Div. of Wash. State Ferries*, 168 Wash. App. 278, 289, 276 P.3d 341, 347 (2012).

124. 170 Wash. 2d 418, 241 P.3d 1245 (2010).

125. *Id.* at 440, 241 P.3d at 1255.

126. *See, e.g., Wade’s Eastside Gun Shop, Inc. v. Dep’t of Labor & Indus.*, 185 Wash. 2d 270, 280, 372 P.3d 97, 101 (2016) (upholding a half a million-dollar penalty against Department of Labor and Industries).

government budgets.<sup>127</sup> In 2015, the costs to local and state government amounted to over sixty million dollars; although, the agencies were able to recoup a small fraction of the amount in usage charges.<sup>128</sup>

The penalties for violations of the PRA are governed by Revised Code of Washington section 42.56.550.<sup>129</sup> After a public records request, a requester who believes a record was improperly denied may file a case in “the superior court in the county in which [the] record is maintained.”<sup>130</sup> The court may “require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records.”<sup>131</sup> The agency must then show why an exemption applies.<sup>132</sup> The agency bears the burden of proof, unless a third party seeks to enjoin the disclosure of records.<sup>133</sup> The court can decide if denial or exemptions are proper under the PRA solely on affidavits.<sup>134</sup> The statute of limitations for PRA claims is “one year [from] the agency’s claim of exemption or the last production of a record on a[n] . . . installment basis.”<sup>135</sup>

In the event that a denial or claimed exemption is found improper, the agency bears costs, plaintiff’s attorney’s fees, plus statutory penalties for the suit.<sup>136</sup> The statutory penalties alone can add up to one hundred dollars for each record denied or improperly exempted *per day*.<sup>137</sup> In simple terms, the court takes the number of days since the record was denied and multiplies it by the number of documents denied and by the amount of the individual fee.<sup>138</sup> Additionally, there is no stay on the

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127. WASH. ST. AUDITOR’S OFF., EFFECT OF PUBLIC RECORDS REQUESTS ON WASHINGTON STATE AND LOCAL GOVERNMENT (2016), [http://www.sao.wa.gov/state/Documents/PA\\_Public\\_Records\\_2-pager.pdf](http://www.sao.wa.gov/state/Documents/PA_Public_Records_2-pager.pdf) [https://perma.cc/CSC8-SACM].

128. *Id.*

129. WASH. REV. CODE § 42.56.550 (2016).

130. *Id.* Often state agencies list this location by regulation. *See, e.g.*, WASH. ADMIN. CODE §§ 44-06-050, 44-06-060 (2018).

131. WASH. REV. CODE § 42.56.550.

132. *Id.*; Koenig v. Thurston County, 175 Wash. 2d 837, 842, 287 P.3d 523, 525 (2012).

133. WASH. REV. CODE § 42.56.550; Planned Parenthood of Great Nw. v. Bloedow, 187 Wash. App. 606, 618, 350 P.3d 660, 665 (2015) (“The party seeking to enjoin production of records under the PRA ‘bears the burden of proving an exemption or statute prohibits production in whole or in part.’” (quoting Bainbridge Island Police Guild v. City of Puyallup, 172 Wash. 2d 398, 407–08, 259 P.3d 190, 194 (2011))).

134. WASH. REV. CODE § 42.56.550.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

number of days while the court proceedings occur.<sup>139</sup> Thus, cases that are contested to the appellate level can have years' worth of daily fees.<sup>140</sup>

In the event of improperly denied or exempted records, the court may grant fees.<sup>141</sup> Furthermore, there is no requirement that the agency need to have acted unreasonably in order to award fees.<sup>142</sup> Good faith can result in fees on the lower end of the spectrum, and bad faith can result in higher fees.<sup>143</sup> Ultimately, in the event that a requester succeeds, costs including attorney's fees must be paid by the agency, but the decision to grant fees is left to the court.<sup>144</sup>

Furthermore, the superior court has latitude in determining the definition of a record for the purposes of calculating fees. In *Wade's Eastside Gun Shop v. Department of Labor & Industries*,<sup>145</sup> the Seattle Times requested all of the Department of Labor and Industries' (L&I) records on lead exposure at Wade's Eastside Gun Shop.<sup>146</sup> After a protracted communication back and forth between the parties, the Seattle Times brought L&I to court and prevailed.<sup>147</sup> Instead of accepting L&I's determination of the number of documents withheld, the superior court determined the number of pages that were wrongfully withheld.<sup>148</sup> The court decided that each page represented an individual document, and it used that number multiplied by the number of days that had passed since the request denial to calculate the fee to be paid to the Seattle Times.<sup>149</sup> The Washington State Supreme Court upheld this determination, noting, "the plain language of the PRA confers great discretion on trial courts to determine the appropriate penalty for a PRA violation."<sup>150</sup>

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139. *Id.*

140. *See, e.g., Sanders v. State*, 169 Wash. 2d 827, 865, 240 P.3d 120, 139 (2010) (finding a number of the contested records, which were not disclosed until nearly six years after the request).

141. WASH. REV. CODE § 42.56.550.

142. *King County v. Sheehan*, 114 Wash. App. 325, 351, 57 P.3d 307, 320 (2002) (citing *Amren v. City of Kalama*, 131 Wash. 2d 25, 37, 929 P.2d 389, 395 (1997)).

143. *Yousoufian v. Office of Ron Sims*, 168 Wash. 2d 444, 460, 229 P.3d 735, 744 (2010). This opinion outlines a number of aggravating and mitigating factors that are too lengthy to list here. *Id.* However, the factors generally relate to the reasons for which the agency withheld the record, and the general strength of the agency's claim. *Id.*

144. WASH. REV. CODE § 42.56.550.

145. 185 Wash. 2d 270, 372 P.3d 97 (2016).

146. *Id.* at 276, 372 P.3d at 99.

147. *Id.*

148. *Id.*

149. *Id.* (noting that there were five different time periods where fees were improperly withheld; accordingly, the number-of-days multiplier was different for the different violations).

150. *Id.* at 278, 372 P.3d at 100. Appellate courts review PRA violations using the abuse of discretion standard. *Id.*



1. *The Public Policy Behind Public Record Requests Can Be Distorted by Public Record Trolls*

Certain individuals utilize public record requests as a money-making enterprise. The most prominent example is Arthur West, who has brought numerous public records cases.<sup>151</sup> Mr. West, in addition to other public records trolls, views public record lawsuits as his livelihood.<sup>152</sup> In response to the City of Puyallup's decision to attempt to appeal a recent Washington State Supreme Court decision, Mr. West told reporters, "[a]s your opponent, I urge you to continue to make mistakes. Without your unreasonable withholding of records, I'm out of a job."<sup>153</sup> These individuals create large requests to attempt to find withheld files, and then sue when records are withheld.<sup>154</sup> These individuals may see themselves as open government supporters;<sup>155</sup> however, the costs of the lawsuits are a burden on local government and agencies.<sup>156</sup> Examples like these demonstrate how simple it is for an individual to phrase requests to skirt the edge of exemptions in order to exact money from agencies.

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151. See, e.g., *West v. Vermillion*, 196 Wash. App. 627, 641, 384 P.3d 634, 643 (2016) (finding a PRA violation but award pending remand); *West v. Thurston County*, 168 Wash. App. 162, 177, 275 P.3d 1200, 1209 (2012) (finding a \$16,020 award plus attorneys' fees); *West v. Gregoire*, No. 42779-6-II, 2012 WL 5348107, at \*4 (Wash. Ct. App. Sept. 11, 2012) (affirming trial court's finding that a twenty-five dollar daily penalty for more than 300 documents over eighty-seven days was an appropriate penalty).

152. John Gillie, *Both Sides in Puyallup Email Records Case Want to Take Fight to U.S. Supreme Court*, FOSTER PEPPER LOC. OPEN GOV'T BLOG (Mar. 30, 2017), <https://www.localopengovernment.com/2017/03/articles/in-the-courts/sides-puyallup-email-records-case-want-take-fight-u-s-supreme-court/#more-2269> [<https://perma.cc/5HVU-Z28R>].

153. *Id.*

154. See, e.g., *West v. Port of Tacoma*, No. 48110-3-II, 2017 WL 2645665, at \*1 (Wash. Ct. App. June 20, 2017) (requesting "1. All records and communications concerning the South Sound Logistics Center [(SSLC)], from January 1, 2005 to present. 2. All correspondence or communication with Diane Sontag. 3. Any records related to potential transport of Uranium" (brackets in original)).

155. See Candice Ruud, *Tacoma Hit with \$50,000 Fine Plus Legal Fees over Stingray Nondisclosure Agreement*, NEWS TRIB. (Mar. 3, 2017), <http://www.thenewstribune.com/news/politics-government/article136371963.html> [<https://perma.cc/K4ZD-ZBJQ>] (calling Arthur West a "[p]ublic records advocate").

156. See cases cited *supra* note 151.

## II. FEDERAL EDUCATION RIGHTS AND PRIVACY ACT: A DIFFERENT DEFINITION OF EDUCATIONAL RECORD

FERPA was enacted in 1974 as an amendment to a federal education bill.<sup>157</sup> The amendment, offered by New York Senator James Buckley, was intended to protect student privacy.<sup>158</sup> Speaking to a legislative conference after the amendment's passage, Buckley said the following:

More fundamentally, my initiation of this legislation rests on my belief that the protection of individual privacy is essential to the continued existence of a free society. There has been clear evidence of frequent, even systematic violations of the privacy of students and parents by the schools through the unauthorized collection of sensitive personal information and the unauthorized, inappropriate release of personal data to various individuals and organizations. . . . It was, therefore, most appropriate that the Congress saw fit to enact the Family Educational Rights and Privacy Act . . . .<sup>159</sup>

Initially, FERPA was not intended to include colleges and universities; their inclusion was the result of a drafting error.<sup>160</sup> The strong protections of student privacy inherent in Senator Buckley's statement have continued on through both congressional changes to FERPA and DOE regulations.<sup>161</sup>

### A. *Basic FERPA: Spending Clause Authorization*

FERPA does not directly authorize or prohibit any activity.<sup>162</sup> Enacted under Spending Clause authority,<sup>163</sup> FERPA applies to all schools and education agencies that receive federal education money.<sup>164</sup> FERPA conditions this money on the recipient school protecting students' and families' rights to access student "education records."<sup>165</sup> Furthermore,

157. Education Amendments of 1974, Pub. L. No. 93-380, § 513, 88 Stat. 484, 571.

158. 121 Cong. Rec. S13,991 (daily ed. May 13, 1975) (statement of Sen. Buckley). In fact, FERPA is often referred to as the "Buckley Amendment." See generally Lynn M. Daggett, *Bucking Up Buckley I: Making the Federal Student Records Statute Work*, 46 CATH. U. L. REV. 617 (1997).

159. 121 Cong. Rec. 13,991 (1975) (statement of Sen. Buckley).

160. Margaret L. O'Donnell, *FERPA: Only a Piece of the Privacy Puzzle*, 29 J.C. & U.L. 679, 683 n.22 (2003). For a detailed description of the mistaken inclusion see *id.* at 679 n.22.

161. See *infra* section II.A.

162. 20 U.S.C. § 1232g(a)(1)(A) (2012).

163. U.S. CONST. art. I, § 8, cl. 1.

164. 20 U.S.C. § 1232g(a)(1)(A).

165. *Id.*

FERPA requires that a recipient school keep a student's "education record" private.<sup>166</sup> Failure to keep these records private results in the termination of all federal education money to the local or state agency that had a pattern, or practice, of releasing "education records."<sup>167</sup>

Specifically regarding privacy, FERPA requires that a school maintain privacy of all student education records except to a small group of acceptable individuals.<sup>168</sup> These individuals are limited to internal school officials,<sup>169</sup> officials at a prospective school at which the student is seeking to enroll,<sup>170</sup> certain government officials,<sup>171</sup> government officials in relation to an application for student financial aid,<sup>172</sup> state and local officials pursuant to statute,<sup>173</sup> officials at accrediting agencies,<sup>174</sup> parents,<sup>175</sup> persons appropriate to protect health and safety in emergencies,<sup>176</sup> and certain government agency representatives.<sup>177</sup> Education records can also be released pursuant to a subpoena.<sup>178</sup> Additionally, a state can further restrict the access of state and local actors to education records.<sup>179</sup> Finally, a parent of a student can give written permission to release specific records.<sup>180</sup> All rights that a parent has pertaining to a dependent student are transferred to the student upon reaching age eighteen.<sup>181</sup>

FERPA's statutory definitions are key to understanding the level of protection an education agency must provide to keep "education

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166. *Id.*

167. *Id.*

168. *Id.* § 1232g(b)(1)(A).

169. *Id.*

170. *Id.* § 1232g(b)(1)(B) (in these scenarios, there is an additional requirement that "the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record").

171. *Id.* § 1232g(b)(1)(C) (authorizing representatives of "(I) the Comptroller General of the United States, (II) the Secretary [of the Department of Education], or (III) State educational authorities"). However, these requests are subject to additional requirements of § 1232g(b)(3). *Id.*

172. *Id.* § 1232g(b)(1)(D).

173. *Id.* § 1232g(b)(1)(E).

174. *Id.* § 1232g(b)(1)(G) (only for accreditation functions).

175. *Id.* § 1232g(b)(1)(H).

176. *Id.* § 1232g(b)(1)(I) (subject to Department of Education regulations).

177. *Id.* §§ 1232g(b)(1)(K)–(L) (noting that these are narrow grants allowing agencies to perform their education related purposes).

178. *Id.* § 1232g(b)(1)(J).

179. *Id.* § 1232g(b)(1).

180. *Id.* § 1232g(b)(2)(A).

181. *Id.* § 1232g(d).

records” private. The linchpin to understanding the broad reach of FERPA is within the definition of “education records.”<sup>182</sup> FERPA defines education records as “those records, files, documents, and other materials which—(i) contain information *directly related* to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.”<sup>183</sup> Similar to public records in the PRA, education records are defined broadly and are not limited to written records.<sup>184</sup> With reference to education records, regulations define a record as “any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche.”<sup>185</sup>

There are a number of exemptions to “education records” that otherwise would be covered. First, FERPA explicitly exempts law enforcement records that were created by the law enforcement unit and are maintained by that unit.<sup>186</sup> However, a record that was an “education record” that was given to a school’s law enforcement unit would retain the “education record” status.<sup>187</sup> Also, a record that was created by a law enforcement unit of a school, but was then maintained by another organization of the school, would not be considered a “law enforcement record.”<sup>188</sup> The other exemptions to “education records” are sole possession memory aids,<sup>189</sup> certain employee records,<sup>190</sup> and certain medical records.<sup>191</sup>

182. *Id.* § 1232g(a)(4)(A).

183. *Id.* (emphasis added).

184. 34 C.F.R. § 99.3 (2017).

185. *Id.*

186. 20 U.S.C. § 1232g(a)(4)(B).

187. 34 C.F.R. § 99.8. (“Records of a law enforcement unit does not mean—(i) Records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of the educational agency or institution other than the law enforcement unit; or (ii) Records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution.”).

188. *Id.*

189. *Id.* § 99.3. This essentially means notes a teacher makes regarding students.

190. *Id.* Employee records that “(A) Are made and maintained in the normal course of business; (B) Relate exclusively to the individual in that individual’s capacity as an employee; and (C) Are not available for use for any other purpose.” *Id.* However, records of student employees are still considered education records provided that the employee is “employed as a result of his or her status as a student.” *Id.*

191. *Id.* This only applies to records of a “student who is 18 years of age or older” or a college student that are “(i) [m]ade or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity; (ii) [m]ade, maintained, or used only in connection with treatment of the student; and (iii) [d]isclosed only to individuals providing the treatment.” *Id.*

Finally, there is an exemption to the release of education records for “directory information.”<sup>192</sup> Directory information is narrowly defined in the statute.<sup>193</sup> Directory information is limited to the student’s name, address, phone number, date and place of birth, field of study, participation in officially recognized sports or activities, an athlete’s height and weight, dates of attendance, degrees or awards, and previous educational agency or institutions attended by the student.<sup>194</sup> The reasons for the directory information exemption are varied, but a simplistic observation would be that otherwise commencement activities of a college would clearly be FERPA violations.

A school does not need to create the record in order for it to be covered by FERPA.<sup>195</sup> FERPA requires only that the record be “directly related” to the student and “maintained” by the educational agency.<sup>196</sup> Thus, a record from an external source that is directly related to a student and is maintained by the school is an educational record.<sup>197</sup>

For example, a Louisiana federal court ruled that a letter by a parent to a teacher became an educational record once it was passed to the teacher.<sup>198</sup> The parent, a politician, wrote to the teacher requesting “that her son be excluded from school activities that would expose him to teaching contrary to [the mother’s] own opinions.”<sup>199</sup> During a later election, the teacher released the letter to a newspaper.<sup>200</sup> In a subsequent lawsuit, the court held that this violated the mother’s right to privacy embodied in FERPA.<sup>201</sup>

All records that are maintained by an educational agency and directly related to a student are education records unless they are subject to an exemption discussed above.<sup>202</sup> This can include information from

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192. 20 U.S.C. § 1232g(a)(5) (2012).

193. *Id.*

194. *Id.*

195. *Warner v. St. Bernard Parish Sch. Bd.*, 99 F. Supp. 2d 748, 752 (E.D. La. 2000); *Belanger v. Nashua, N.H. Sch. Dist.*, 856 F. Supp. 40, 48 (D.N.H. 1994).

196. 20 U.S.C. § 1232g(a)(4).

197. *Id.*

198. *Warner*, 99 F. Supp. 2d at 752.

199. *Id.* at 750.

200. *Id.*

201. *Id.* at 752. This lawsuit was premised on the contention that there is a private cause of action for FERPA violations utilizing 42 U.S.C. § 1983. *Id.* at 750. Following this decision, however, the Supreme Court later held that FERPA does not contain a private cause of action. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002).

202. *See generally* 20 U.S.C. § 1232g.

parents and also confidential information such as social security numbers, grades, and disciplinary history.<sup>203</sup>

### 1. *State and Local Agency FERPA Rulemaking*

Many Washington state and local education agencies have adopted FERPA via their rulemaking processes.<sup>204</sup> These agencies either implement the exact wording of FERPA via the Washington Administration Code<sup>205</sup> or simply state that FERPA applies to public record requests.<sup>206</sup> The state and local agency FERPA rules have not been challenged in court.

### 2. *The Importance of Federal Education Money*

Underpinning FERPA is the punishment for non-compliance—the loss of federal education money. FERPA requires that “[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records.”<sup>207</sup>

The loss of these funds is highly significant.<sup>208</sup> School districts, colleges and universities heavily rely on this money.<sup>209</sup> In primary and secondary schools, this money supports low-income school lunches, giving reduced-cost and no-cost lunches to students.<sup>210</sup> These funds support Title I schools and school districts, allocating funds so that the

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203. *Id.*

204. *See, e.g.*, WASH. ADMIN. CODE §§ 132Z-112-030, 478-140-010, 504-21-010 (2018) (Cascadia Community College, University of Washington, and Washington State University policies on student education records, respectively); SEATTLE PUB. SCHS., SUPERINTENDENT PROCEDURE 3231SP (2011), [https://www.seattleschools.org/UserFiles/Servers/Server\\_543/File/District/Departments/School%20Board/Procedures/Series%203000/3231SP.pdf](https://www.seattleschools.org/UserFiles/Servers/Server_543/File/District/Departments/School%20Board/Procedures/Series%203000/3231SP.pdf) [<https://perma.cc/8UFD-8FDS>].

205. *See* WASH. ADMIN. CODE § 132Z-112-030.

206. SEATTLE PUB. SCH., SUPERINTENDENT PROCEDURE 3231SP (2011), [https://www.seattleschools.org/UserFiles/Servers/Server\\_543/File/District/Departments/School%20Board/Procedures/Series%203000/3231SP.pdf](https://www.seattleschools.org/UserFiles/Servers/Server_543/File/District/Departments/School%20Board/Procedures/Series%203000/3231SP.pdf) [<https://perma.cc/8UFD-8FDS>].

207. 20 U.S.C. § 1232g(b)(1) (2012).

208. *See generally* U.S. DEP’T. OF EDUC., FY 2017 EDUCATION BUDGET FACTSHEET 2 (2017), <https://www2.ed.gov/about/overview/budget/budget17/budget-factsheet.pdf> [<https://perma.cc/3Z6Z-6GEU>].

209. Delisle, *supra* note 10. Breaking that number down, \$14.8 billion went directly to K-12 school nutrition funding, \$8 billion to Head Start programs, and \$67.5 billion as direct appropriation. *Id.*

210. *Id.*

schools are able to provide adequate technology, buildings, and supplies.<sup>211</sup>

These funds also have a substantial effect at the post-secondary level. Federal education allocations support Pell Grants, which grant money for college tuition to low-income students.<sup>212</sup> They also fund federally guaranteed student loans.<sup>213</sup> Many post-secondary institutions rely heavily on these tuition funds, and a loss of funds can have deleterious effects on a university.<sup>214</sup> For example, in response to loss of federal student loans, Charlotte Law School immediately laid off dozens of faculty members and closed the school pending negotiations with the Department of Education.<sup>215</sup> Although the loss of federal funds was not related to FERPA violations, the result would be the same if a university lost all federal funds as a result of FERPA violations.<sup>216</sup> Numerous other colleges have acted similarly in response to the loss of federal funds for tuition.<sup>217</sup>

#### B. *Department of Education's Defense of a Broad "Education Record" Definition*

The Department of Education has defended the broad definitions embedded within FERPA for education record confidentiality. In response to public record requests in states, the DOE has both filed amicus briefs and launched separate lawsuits to enjoin disclosure.<sup>218</sup>

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211. 20 U.S.C. §§ 6301–7981.

212. *Id.* § 1070a.

213. *Id.* § 1078.

214. See Michael Gordon, *Feds, Charlotte School of Law Fail to Reach Agreement over Federal Student Loans*, CHARLOTTE OBSERVER (Jan. 19, 2017, 10:51 AM), <http://www.charlotteobserver.com/news/local/education/article127341129.html> [<https://perma.cc/JXC2-T82B>].

215. *Id.*

216. *Id.* The reason that Charlotte Law School laid off faculty is tied to the school's loss of federal funds. *Id.* The reason for losing the funds is not material to the result. It is certainly possible for a university to survive without federal tuition aid, but the ability of the school to offer financial aid to non-wealthy students would be severely curtailed.

217. See, e.g., Kathryn Vasel & Katie Lobosco, *For-Profit College ITT Shuts Down: Tens of Thousands of Students in the Lurch*, CNN MONEY (Sept. 9, 2016, 11:21 AM), <http://money.cnn.com/2016/09/06/pf/college/itt-shuts-down/> [<https://perma.cc/6W74-DKGY>]; Dan Voorhis, *Heritage College Closes*, WICHITA EAGLE (Nov. 1, 2016, 4:25 PM), <http://www.kansas.com/news/business/article11891532.html> [<https://perma.cc/XE3N-AJE6>].

218. See, e.g., *United States v. Miami Univ.*, 294 F.3d 797, 819–20 (6th Cir. 2002) (enjoining disclosure after being unsuccessful in state court). However, the DOE has not always taken such a proactive role in defending the education records definition, and for a detailed discussion see Thomas R. Baker, *State Preemption of Federal Law: The Strange Case of College Student Disciplinary Records Under F.E.R.P.A.*, 149 ED. LAW REP. 283, 292 (2001).

In *State ex rel. The Miami Student v. Miami University*,<sup>219</sup> a student newspaper editor asked for all of Miami University's student disciplinary records that related to sexual assault.<sup>220</sup> After being denied the records, the editor filed a public records request for the files.<sup>221</sup> The university then released heavily redacted records.<sup>222</sup> The editor then sued.<sup>223</sup> The editor claimed the extent of the redactions rendered the records meaningless and thus violated Ohio's public records law.<sup>224</sup> The Supreme Court of Ohio agreed with the editor and ordered the release of the records.<sup>225</sup> The Court held that the university could only redact the "student's name, Social Security Number, and student identification number" and "[t]he exact date and time of the alleged incident."<sup>226</sup>

After the ruling, a number of newspapers requested similar files from both Miami University and Ohio State University.<sup>227</sup> In response, the DOE launched a suit to enjoin the release of the records.<sup>228</sup> The DOE argued that these records were clearly education records under FERPA and that the release of such records would cause the universities to violate FERPA.<sup>229</sup> Furthermore, the DOE asserted that if the records were released, the universities would lose all federal education allocations.<sup>230</sup> The Sixth Circuit, agreeing with the DOE, permanently enjoined the universities from releasing the records.<sup>231</sup> The court held that the universities' use of federal funds created the requirement that the university follow FERPA requirements.<sup>232</sup>

More recently, the DOE fought as an amicus in a Montana case.<sup>233</sup> In *Krakauer v. State*,<sup>234</sup> Jon Krakauer, a journalist, requested student

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219. 680 N.E.2d 956 (Ohio 1997).

220. *Id.* at 957.

221. *Id.*

222. *Id.* ("Miami officials deleted from these records the identity, sex, and age of the accuseds, as well as the date, time, and location of the incidents giving rise to the disciplinary charges. University officials also deleted certain internal memoranda, written statements prepared by students appealing adverse [disciplinary] decisions, and the disposition of certain proceedings.").

223. *Id.*

224. *Id.*

225. *Id.* at 959.

226. *Id.*

227. *United States v. Miami Univ.*, 294 F.3d 797, 804 (6th Cir. 2002).

228. *Id.*

229. *Id.* at 804–05.

230. *Id.* at 805.

231. *Id.* at 824.

232. *Id.*

233. *Krakauer v. State*, 2016 MT 227N, 384 Mont. 527, 381 P.3d 524.



records relating to a prominent student athlete's expulsion reversal.<sup>235</sup> The athlete, a quarterback for the University of Montana, was accused of sexual assault.<sup>236</sup> Certain information about the university's disciplinary process was available pursuant to a court order in a separate civil suit; however, the public did not know the final result of the athlete's appeals.<sup>237</sup> From the other civil suit, Mr. Krakauer knew that after an internal university investigation, the disciplinary committee expelled the athlete.<sup>238</sup> The athlete then appealed to the Montana Commissioner of Higher Education.<sup>239</sup> Mr. Krakauer did not know the Commissioner's action after the final appeal.<sup>240</sup> But Mr. Krakauer believed that the Commissioner had overturned the university's decision and reinstated the athlete.<sup>241</sup>

Mr. Krakauer requested,

[T]he opportunity to inspect or obtain copies of public records that concern the actions of the Office of the Commissioner of Higher Education in July and August 2012 regarding the ruling by the University Court of the University of Montana in which [a] student . . . was found guilty of rape and was ordered expelled from the University.<sup>242</sup>

After the Commissioner denied the request, Mr. Krakauer filed suit under the Montana Constitution for the right to view the aforementioned records.<sup>243</sup>

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234. 2016 MT 227N, 384 Mont. 527, 381 P.3d 524.

235. *Id.* ¶ 6, 381 P.3d at 527.

236. Keila Szpaller, *Krakauer's Request for Records in Rape Case Again Going to Montana Supreme Court*, INDEP. REC. (July 7, 2015), [http://helenair.com/news/local/krakauer-s-request-for-records-in-rape-case-again-going/article\\_4c518807-dd41-582b-9860-44ef7bd0f480.html](http://helenair.com/news/local/krakauer-s-request-for-records-in-rape-case-again-going/article_4c518807-dd41-582b-9860-44ef7bd0f480.html) [<https://perma.cc/2RB9-QC6G>].

237. *Doe v. Univ. of Mont.*, No. CV 12-77-M-DLC, 2012 WL 2416481, at \*1 (D. Mont. June 26, 2012).

238. *Krakauer*, 381 P.3d at 526. There was an additional criminal investigation that did not result in charges, but is not at issue in the case. *See Szpaller*, *supra* note 236.

239. *Krakauer*, 381 P.3d at 527. There was an intermediate appeal to the University President, but the President left the decision undisturbed. *Id.* at 526–27.

240. *See Doe*, 2012 WL 2416481, at \*1. However, this suit ended before the Commissioner's decision; thus, no explicit information is available. *See Jon Krakauer, How Much Should a University Have to Reveal About a Sexual Assault Case?*, N.Y. TIMES MAG. (Jan. 21, 2016), <https://www.nytimes.com/2016/01/20/magazine/how-much-should-a-university-have-to-reveal-about-a-sexual-assault-case.html> [<https://perma.cc/4S56-YDM4>].

241. *Krakauer*, 381 P.3d at 527.

242. *Id.*

243. *Id.* Public record requests in Montana can be premised on the Montana Constitution's Right to Know section, which reads “[n]o person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its

Mr. Krakauer succeeded at trial, and the court “ordered the Commissioner to make available for inspection and/or copying within 21 days the requested records, with students’ names, birthdates, social security numbers, and other identifying information redacted.”<sup>244</sup> The Commissioner appealed, and the DOE filed an amicus brief that the Supreme Court of Montana<sup>245</sup> found persuasive.<sup>246</sup> The DOE argued that simply removing explicitly identifying information would not render the education records producible under FERPA.<sup>247</sup> Since Mr. Krakauer knew the identity of the student, “[w]here a request targets education records relating to a particular student, identified by name, FERPA’s protections unquestionably apply.”<sup>248</sup> Thus, the Court vacated the trial court’s decision, and remanded the case in order to allow the trial court to determine if the records should be released under a subpoena—a valid exemption to FERPA.<sup>249</sup> The DOE frequently intervenes in public records cases because the DOE stridently defends FERPA’s broad definitions.<sup>250</sup>

### III. EDUCATION MONEY AND STATUTORY PRA DAMAGES: RESOLVING PROBLEMS BETWEEN THE PRA AND FERPA

The significant interplay between the PRA and FERPA needs court resolution before it causes significant harm to Washington education agencies. Public records abound within education agencies,<sup>251</sup> and carefully written requests have the potential to fall outside of the PRA’s

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subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.” *Id.* at 528 (quoting MONT. CONST. art. II, § 9).

244. *Id.* at 527 (internal quotations omitted).

245. Montana does not have an intermediate appellate court. MONT. CODE ANN. § 3-2-203 (2017) (granting appellate jurisdiction). Appeals from Montana District courts proceed directly to the Supreme Court of Montana. *See, e.g., Krakauer*, 381 P.3d at 527.

246. *Krakauer*, 381 P.3d at 531.

247. *Id.*

248. *Id.* (quoting Brief Amicus Curiae of the United States, *Krakauer v. State*, 381 P.3d 524 (Mont. 2016) (No. DA 15-0502), 2015 WL 6567316 at \*9).

249. *Id.* at 535.

250. *See id.*; *United States v. Miami Univ.*, 294 F.3d 797, 804 (6th Cir. 2002); *Press-Citizen Co. v. Univ. of Iowa*, 817 N.W.2d 480, 492 (Iowa 2012).

251. Note that public records are “any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” WASH. REV. CODE § 42.56.010 (2016); *see supra* notes 30, 32, 33 and accompanying text.

narrow “files maintained for students exception”<sup>252</sup> but within the FERPA definition of “education records.”<sup>253</sup> Noting that there are numerous public records trolls who have made ample money—if not careers<sup>254</sup>—out of public records requests, it is important that Washington Courts find that FERPA is an “other statute” under the PRA exemption. A failure to find so could result in incredible financial harm to public agencies, either from PRA statutory damages or loss of federal education money. However, Washington courts are not predisposed to find “other statute” exemptions,<sup>255</sup> and the non-binding nature of FERPA makes such a determination more difficult.<sup>256</sup> In order to alleviate the problems in the interplay of these two laws, Washington courts should find that FERPA is an “other statute” under the PRA. Thus, the scope of the exemption should expand “files maintained for students” to FERPA’s “education records.”

*A. An Examination of the Problem: “Maintained for Students” Versus “Education Records”*

The PRA and FERPA exemptions and definitions are decidedly different regarding education agency records. The PRA “files maintained for students” exemption covers the personal information in files maintained *for* students.<sup>257</sup> The emphasis is on the personal nature of the files and the files must be maintained in order to benefit the student whose personal information is present.<sup>258</sup> In contrast, FERPA covers a far broader swath of records. FERPA is implicated by records 1) *directly related* to a student and 2) maintained by an education

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252. WASH. REV. CODE § 42.56.230(1) (2016); *see supra* notes 90, 92, 93 and accompanying text.

253. 20 U.S.C. § 1232g(a)(4); *see supra* note 183 and accompanying text.

254. *See supra* section I.D.1.

255. *See, e.g., Doe ex rel. Roe v. Wash. State Patrol*, 185 Wash. 2d 363, 368, 374 P.3d 63, 65 (2016).

256. 20 U.S.C. § 1232g(a)(4) (noting that FERPA is authorized via the spending clause, and a violation of FERPA can result in the rescinding of federal money, but no additional penalties). It can be useful to think of a spending clause statute as a sort of contract where the state that accepts the money agrees to abide by the rules attached to the money; accordingly, the failure to follow the attached rules results in the cancellation of the contract, but no additional punishment. *See* Brian Galle, *Getting Spending: How to Replace Clear Statement Rules with Clear Thinking About Conditional Grants of Federal Funds*, 37 CONN. L. REV. 155, 159 (2004); Terry Jean Seligmann, *Muddy Waters: The Supreme Court and the Clear Statement Rule for Spending Clause Legislation*, 84 TUL. L. REV. 1067, 1120 (2010).

257. *See Lindeman v. Kelso Sch. Dist.* No. 458, 162 Wash. 2d 196, 202, 172 P.3d 329, 331 (2007) (citing WASH. REV. CODE § 42.56.230(1)).

258. *Id.*

agency.<sup>259</sup> While the same “maintained” language is present in both statutes, the distinction is between “directly related” and “personal information.”

There is a significant difference between information that directly relates to students and personal information that is for the student's benefit. As *Lindeman* laid out, the PRA exemption is only concerned with the files that a school must keep for a student, such as grades and test scores.<sup>260</sup> In contrast, FERPA's “directly related” language is clearly broader.<sup>261</sup> The focus on “directly related” concerns the relation of the student to the file, not whether the file is of any benefit to the student.<sup>262</sup> Naturally, there are files at all schools that are not for the benefit of students but do directly relate to the students.

Take, for example, the issue of trespass orders as a result of a disciplinary decision within a college. As the result of some problematic action of the student, an internal decision within the college requires that the student be barred from the college grounds. The record of this order is given to the campus police so that the order can be enforced. Now, an individual submits a public record request for the no-trespass orders housed with the campus police. The college itself does not maintain the file, but instead it is maintained by an outside agency. Additionally, the file certainly directly relates to the student, but excluding the student from campus is not a benefit to the named student, but instead a decision built on protecting the greater campus community. Thus, an argument for the narrow “files maintained for students” PRA exemption is precluded. The file is not maintained by an education agency and, other than the student's name, it does not contain personal information about the student.

However, it is an education record under FERPA.<sup>263</sup> The simple fact that it is maintained by an outside agency does not limit FERPA's reach.<sup>264</sup> Additionally, the law enforcement exemption to education records does not apply to this record because the college initially created

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259. 20 U.S.C. § 1232g(a)(4). Note that the file could also be maintained by an authorized third-party. For a more thorough discussion, see *supra* note 183 and accompanying text.

260. *Lindeman*, 162 Wash. 2d at 202, 172 P.3d at 331.

261. 20 U.S.C. § 1232g(a)(4).

262. *Id.*; see also Brief Amicus Curiae of the United States, *Krakauer v. State*, 381 P.3d 524 (Mont. 2016) (No. DA 15-0502) 2015 WL 6567316 at \*8–9 (arguing that the fact that a disciplinary record regards a student makes it an education record, regardless of the public interest or whether the personal information is removed).

263. 20 U.S.C. § 1232g(a)(4).

264. *Id.* (covering “a person acting for such agency or institution” within the definition of education records).

the no-trespass order.<sup>265</sup> However, the trespass files are unquestionably directly related to a student since the records involve the treatment of that student on the campus property. Thus, the no-trespass order could not be released if the school followed its FERPA requirements.

Schools keep records that directly relate to students but do not contain the personal information of students, and thus these records fall outside the PRA exemption.<sup>266</sup> The narrower PRA exemption, and its similarly narrow interpretation, jeopardize funding at Washington education agencies.<sup>267</sup> This can leave education agencies in a Catch-22, either accepting damages in PRA cases<sup>268</sup> or losing critical federal education money by releasing the record.<sup>269</sup> It is essential that Washington courts recognize FERPA's "education records" as expanding the protections of student records.

*B. "Other Statutes" Exemptions: Washington Courts Are Reluctant, but Public Policy Concerns Are Influential*

The chief concern of Washington courts in applying the "other statutes" exemption of the PRA is whether the purportedly exempting statute clearly prohibits disclosure.<sup>270</sup> To clearly prohibit, the plain reading of the statute must prohibit disclosure.<sup>271</sup> This is problematic when juxtaposed with FERPA's Spending Clause authorization.<sup>272</sup> FERPA does not make explicit requirements, instead it operates as an agreement—the education agency accepts federal money in exchange for an agreement to comply with FERPA.<sup>273</sup>

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265. *Id.* § 1232g(a)(4)(II) (2012) ("[E]ducation records does not include . . . records maintained by a law enforcement unit of the educational agency or institution *that were created by that law enforcement unit* for the purpose of law enforcement." (emphasis added)).

266. Consider class rank information within a college. The grade bands directly relate to a student because they inform whether the student is inside or outside a certain class rank, but the bands themselves do not contain any personal information of students.

267. *See supra* section II.A.2.

268. *See supra* section I.D.

269. *See supra* section II.A.2; *supra* notes 214–17 and accompanying text.

270. *Hangartner v. City of Seattle*, 151 Wash. 2d 439, 453, 90 P.3d 26, 33 (2004); *see also* *White v. Clark County*, 188 Wash. App. 622, 631, 354 P.3d 38, 41 (2015) ("An 'other statute' exemption applies only if that statute explicitly identifies an exemption; the PRA does not allow a court to imply such an exemption.").

271. *White*, 188 Wash. App. at 631, 354 P.3d at 41.

272. *See generally* 20 U.S.C. § 1232g (2012).

273. *Id.*; *see also supra* notes 207–15 and accompanying text.

However, the interests at bar maintaining both student privacy and federal education money are compelling.<sup>274</sup> Students have a legitimate privacy interest in their records.<sup>275</sup> The students themselves are not public employees or public agents, yet a public records request could require an education agency to produce information concerning the student's private affairs. Releasing the student records simply because the student attends a public school is problematic.<sup>276</sup> Furthermore, the release of these records would be disastrous for public education agencies within the state. If the DOE follows through with the threat from *United States v. Miami University*, the loss of funds would devastate education agencies and make it impossible for low-income students to attend public universities in the state.<sup>277</sup>

As a result, Washington courts should view FERPA as an "other statute" under the PRA. The student privacy concerns inherent to FERPA are important, and, on a practical level, the PRA is about viewing government records, not student educational files.<sup>278</sup> Furthermore, education agencies need federal education money to provide vital services.<sup>279</sup>

### C. *The Spending Clause Authorization Should Not Bar an "Other Statute" Determination*

As the DOE persuasively argued in *Miami* and *Krakauer*, by accepting federal money, the educational agency is bound under FERPA.<sup>280</sup> The binding nature of FERPA makes it essential that

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274. *United States v. Miami Univ.*, 294 F.3d 797, 817–18 (6th Cir. 2002) (discussing the purpose of FERPA to protect student privacy); *see also supra* section II.A.

275. *Miami Univ.*, 294 F.3d at 818 (noting that FERPA protects an "inherent privacy interest" that is diminished with the release of personally identifiable information).

276. Although Washington courts do not generally consider public policy in determining PRA exemptions, these issues do still impact decisions. *See, e.g.*, *Planned Parenthood of Great Nw. v. Bloedow*, 187 Wash. App. 606, 610, 350 P.3d 660, 661 (2015) ("We also conclude the record establishes disclosure of induced abortion data that identifies the health care provider is not in the public interest and *would substantially and irreparably damage the health care providers and a vital governmental function. . . .*" (emphasis added)).

277. Gordon, *supra* note 214; *supra* notes 208–14 and accompanying text.

278. *See supra* section II.B.

279. *See supra* section I.A.; U.S. DEP'T OF EDUC., TEN FACTS ABOUT K-12 EDUCATION FUNDING, <https://www2.ed.gov/about/overview/fed/10facts/index.html> [<https://perma.cc/S628-SAK3>].

280. *Id.* at 946; Brief Amicus Curiae of the United States, *supra* note 262, at \*9 ("Once the conditions and the funds are accepted, the school is indeed prohibited from systematically releasing education records without consent."); Final Brief of United States at 32, *United States v. Miami Univ.*, 294 F.3d 797 (6th Cir. 2002) (No. 00-3518) 2000 WL 35462804 ("[U]niversities that accept federal funds agree to comply with the FERPA, and therefore they may not release student

Washington courts respect FERPA's education records definition. Given that FERPA has a broader definition of student records embodied in "education records" than the PRA's narrower definition of "files maintained for students," Washington courts should find that FERPA is an "other statute" under the PRA and expand the protections for Washington students. This both alleviates ambiguity within the law and gives education professionals clearer guidance in responding to public records requests.<sup>281</sup>

This decision is in line with other states' eventual decisions when confronted with ambiguity between FERPA's definitions and their state public records laws.<sup>282</sup> In *Krakauer*, the Montana Supreme Court found that FERPA's Spending Clause legislation became binding on a state once it accepted the federal money.<sup>283</sup> Similarly, the Ohio Supreme Court found that FERPA barred production of public records.<sup>284</sup> Washington courts should follow suit when approached with this type of public records request.

Furthermore, the decisions in which Washington courts have not found "other statute" exemptions hinge on the purpose behind the purported "other statutes" laws.<sup>285</sup> For example, in *Doe ex rel. Roe v. Washington State Patrol*, the failure to find Revised Code of Washington section 4.24.550 an "other statute" hinged on the lack of

disciplinary records without obtaining consent except as authorized by the FERPA. Nothing in any state's law can change that result."); *accord* *Krakauer v. State*, 2016 MT 227N, 384 Mont. 527, 530, 381 P.3d 524, 535–36 ("FERPA is more than mere words in the wind. . . . By signing the Program Participation Agreement, the University acknowledged the potential consequence of loss of federal funding in the event that it violated FERPA.").

281. See *supra* sections I.D., II.A.2; Lynn M. Daggett, *FERPA in the Twenty-First Century: Failure to Effectively Regulate Privacy for All Students*, 58 CATH. U. L. REV. 59, 97 (2008) (discussing problems for education professions with ambiguity between FERPA and state public record laws).

282. See *State ex rel. ESPN, Inc. v. Ohio State Univ.*, 132 Ohio St.3d 212, 2012-Ohio-2690, 970 N.E.2d 939, at ¶¶ 23–26; *Osborn v. Bd. of Regents of Univ. of Wis. Sys.*, 647 N.W.2d 158, 168 (Wis. 2002); *Unincorporated Operating Div. of Ind. Newspapers, Inc. v. Trustees of Ind. Univ.*, 787 N.E.2d 893, 904 (Ind. Ct. App. 2003); *Krakauer*, 381 P.3d at 530–31; *DTH Pub. Corp. v. Univ. of N.C. at Chapel Hill*, 496 S.E.2d 8, 13 (N.C. Ct. App. 1998).

283. *Krakauer*, 381 P.3d at 530.

284. *Ohio State Univ.*, 132 Ohio St.3d 212, 2012-Ohio-2690, 970 N.E.2d 939, at ¶¶ 23–26 ("Ohio State, having agreed to the conditions and accepted the federal funds, was prohibited by FERPA from systematically releasing education records without parental consent.").

285. See *Doe ex rel. Roe v. Wash. State Patrol*, 185 Wash. 2d 363, 385, 374 P.3d 63, 73 (2016) (holding statute not covered by "other statute" exemption because statute's purpose is to increase record release); *Belo Mgmt. Servs., Inc. v. Click! Network*, 184 Wash. App. 649, 653–54, 343 P.3d 370 (2014) (holding purpose of federal regulation was to allow agencies, who submitted documents to the Federal Trade Commission, to request that Federal Trade Commission not disclose those records; thus, the state agencies still had a duty to disclose).

specificity in the statute.<sup>286</sup> The legislative history of the statute made it clear that this was only an attempt to expand access to sex offender records, not limit the exposure of the records.<sup>287</sup> None of these concerns are present in FERPA's prohibitions. As discussed above, FERPA's purpose was to *limit* private citizens and companies from accessing student education records without the consent of the student.<sup>288</sup> Additionally, FERPA is quite clear that it prohibits the practice of releasing education records after accepting federal education money.<sup>289</sup> Thus, Washington courts should recognize FERPA as a valid "other statute" under the PRA.

Finally, Washington courts can rely on more than FERPA requirements because FERPA definitions and requirements have been adopted by numerous state and local education agencies.<sup>290</sup> Washington courts have accepted federal rules as valid "other statute" exemptions to the PRA,<sup>291</sup> and thus, it is not a stretch to accept the FERPA-based rulemaking as a valid exemption. In the event that FERPA alone is not sufficient for the "other statute" exemption, the court should rely on the state and local rulemaking as a valid "other statute" exemption.

FERPA's Spending Clause authorization should not bar finding it to be an "other statute" exemption under Washington's PRA. By accepting federal education money, the state is bound by FERPA.<sup>292</sup> Further, none of the concerns from *Washington State Patrol* are present.<sup>293</sup> As a result, FERPA should be recognized as a valid "other statute" exemption to the PRA.

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286. *Wash. State Patrol*, 185 Wash. 2d at 385, 374 P.3d at 73.

287. *Id.* at 373, 374 P.3d at 67.

288. 121 Cong. Rec. 13,991 (May 13, 1975) (statement of Sen. Buckley); *see also supra* note 158.

289. 20 U.S.C. § 1232g (2012) ("No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records."); *see also supra* section II.A.

290. *See supra* section II.A.1.

291. *See supra* notes 123–25.

292. It is important to note that the U.S. Supreme Court has struck down one Spending Clause-enabled restriction. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 585 (2012). In *Sebelius*, the Court found that a withdrawal of all Medicaid payments for failure to accept the Medicaid expansion too onerous and coercive. *Id.* However, the loss of a single university or school district's federal funds is not as significant as Medicaid funding, which "accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs." *Id.* at 581; *South Dakota v. Dole*, 483 U.S. 203, 212 (1987) (permitting Congress to condition 5% of federal highways funds on the State raising minimum drinking age to twenty-one).

293. *Doe ex rel. Roe v. Wash. State Patrol*, 185 Wash. 2d 363, 385, 374 P.3d 63, 73 (2016).



## CONCLUSION

Washington courts should find FERPA an “other statutes” exemption to the PRA. PRA exemptions are narrowly construed,<sup>294</sup> and, further, Washington’s statutory exemption for student records is narrow.<sup>295</sup> However, the PRA does allow for “other statutes” to exempt records provided that the exemption specifically denies production.<sup>296</sup> The limitation of the PRA’s “files maintained for students” exemption leaves education agencies open to losing federal funds by violating FERPA. FERPA specifically prohibits the release of “education records” as a condition of accepting federal education funds.<sup>297</sup> Examining the “other statutes” exemption, the policy reasons for keeping student records private are compelling. If the policy reasons alone are not compelling, courts should hold that state and local agency FERPA rulemaking is a valid exemption to the PRA. Thus, Washington courts should find FERPA an “other statutes” exemption to the PRA.

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294. WASH. REV. CODE § 42.56.030 (2016).

295. *Id.* § 42.56.230(1).

296. *Id.* § 42.56.070; *White v. Clark County*, 188 Wash. App. 622, 631, 354 P.3d 38, 41 (2015).

297. 20 U.S.C. § 1232g (2012).